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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

## No. 131

EDMUND P. DANDRIDGE, JR., CHAIRMAN OF THE MARYLAND STATE BOARD OF PUBLIC WELFARE, ET AL.,

*Appellants,*

v.

LINDA WILLIAMS, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

## BRIEF FOR THE APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

## BRIEF FOR THE APPELLANTS

### OPINIONS BELOW

The initial opinion of the United States District Court for the District of Maryland is reprinted at A. 87, the supplemental opinion and order of the District Court, after reargument, is reprinted at A. 238. The opinions are reported at 297 F. Supp. 450.

### JURISDICTION

This suit was brought under 28 U.S.C.A. §1343(3) and 42 U.S.C.A. §1983, to enjoin enforcement of the Maryland maximum grant regulation applicable to AFDC recipients,

to declare its invalidity, and to require the State to make payments equal to "minimum subsistence and shelter needs as established by the Maryland State Board of Public Welfare". The final decree of the District Court was entered on March 18, 1969 and notice of appeal was filed in that Court on March 20, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *King v. Smith*, 392 U.S. 309; *Alabama Pub. Serv. Comm. v. Southern R. Co.*, 341 U.S. 341, 343-44 n. 3. Probable jurisdiction was noted on October 13, 1969.

## QUESTIONS PRESENTED

1. Is a state economic regulation, conceded by the District Court to be proper as applied to some situations, subject to invalidation *in toto* for "overbreadth", notwithstanding the absence of any First Amendment or similar question requiring the validity of the regulation to be judged on its face?

2. Did the District Court err in founding a judgment of invalidity upon assumptions as to the effect of the maximum grant regulation entirely unsupported by the record before it relating to these matters of "constitutional fact"?

3. Did the District Court apply the proper standard of review in invalidating, following explicit inquiry into legislative motive, a broad state regulation supportable on the basis of, and founded on, the economic principle of "less benefit"?

4. Did the District Court err in finding no rational basis for the regulation?

## STATUTES INVOLVED

The challenged regulation, Rule 200, §X,B of the Maryland Department of Social Services (formerly Rule 200, VII, 1), reads as follows:

"B. *Amount* — The amount of the grant is the resulting amount of need when resources are deducted from requirements as set forth in this Rule, subject to a maximum on each grant from each category:

1. $250 — for local departments under any 'Plan A' of Shelter Schedule
2. $240 — for local departments under any 'Plan B' of Shelter Schedule

   *Except that:*

   a. If the requirements of a child over 18 are included to enable him to complete high school or training for employment (III-C-3), the grant may exceed the maximum by the amount of such child's needs.

   b. If the resources of support is paid as a refund (VI-B-6), the grant may exceed the maximum by an amount of such refund. This makes consistent the principle that the amount from public assistance funds does not exceed the maximum.

   c. The maximum may be exceeded by the amount of an emergency grant for items not included in a regular monthly grant. (VIII)

3. A grant is subject to any limitation established because of insufficient funds."

Federal Statutes recognizing validity of state maximum grant regulations:

P.L. 90-248, §213 (b) (1967), 42 U.S.C. 602 (a) (23),

* * * * * *

"§602(a) A State plan for aid and services to needy families with children must . . . .

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and *any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.*" (Emphasis added);

P.L. 87-543, §108 (a) (1962),

(Permitting states with maximum family grant requirements which did not otherwise limit payments to less than state-determined need, to utilize protective payments to third persons, a privilege subsequently made available to states not meeting need requirements by the 1967 amendments);

P.L. 90-248, 42 U.S.C. §1396 (b) (f) (1) (B) (ii),

"Part 2 — Medical Assistance Amendments Limitation on Federal Participation in Medical Assistance

* * * * * *

(B) (i) Except as provided in clause (ii) of this subparagraph, the applicable income limitation with respect to any family is the amount determined, in accordance with standards prescribed by the Secretary, to be equivalent to 133⅓ percent of the highest amount which would ordinarily be paid to a family of the same size without any income or resources, in the form of money payments, under the plan of the State approved under part A of title IV of this Act.

(ii) *If the Secretary finds that the operation of a uniform maximum* limits payments to families of more than one size, he may adjust the amount otherwise determined under clause (i) to take account of families of different sizes." (Emphasis added).

* * * * * *

Federal regulations recognizing validity of state maximum grant regulations:

"Interim Policy May 31, 1968

Need — Requirements
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U. S. Department of Health, Education, and Welfare
Social and Rehabilitation Service
Office of the Administrator

* * * * * *

Interim Policy

3. Requirements for State Plans:
A State plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * * * * *

B. *Standards of Assistance:*

* * * * * *

2. Provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and *any maximums that the State imposes on* the amount of aid paid to families will have been proportionately adjusted. (Emphasis added).

* * * * * *"

Federal Register, Vol. 34, No. 19 — Wednesday, January 29, 1969

"Chapter II — Social and Rehabilitation Service (Assistance Programs), Department of Health, Education, and Welfare

Part 233 — Coverage and Conditions of Eligibility in Financial Assistance Programs

* * * * * *

§233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

* * * * * *

(2) *Standards of assistance.*

* * * * * *

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and *any maximums that the State imposes on the amount of aid paid to families* will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3) (viii) of this paragraph. *Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards.* (Emphasis added).

* * * * * *

(3) *Income and Resources*

* * * * * *

(viii) Provide that payment will be based on the determination of the amount of assistance needed and *that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide.*" (Emphasis added).

## STATEMENT

The present case involves a Maryland regulation, present in differing forms in approximately 20 other states, which establishes (subject to certain exceptions) a ceiling of approximately $250.00 per month on welfare grants under the AFDC program.

The AFDC program finds its antecedents in the Mothers' Pension Laws adopted by various states. These, in turn, derived from the discussions of the White House Conference on Children and Youth of 1909. Prior to 1909, the dominant form of public assistance in the United States, in respect to both the aged and dependent children, was "indoor" (almshouse and orphanage), as distinct from "outdoor" (money payment) relief. The references in legislative history to "aid to dependent children in their own homes" must be viewed against this background. The dominant philosophy of public assistance in the United States, until the early years of this century, was that of the British Poor Law Commission of 1835 in its almost undiluted form, with its fear of a cycle of dependency and its view that the situation of the ablebodied:

> "Shall not be made really or apparently so eligible (desirable) as the situation of the independent laborer of the lowest class * * * It is shown that in proportion as the condition of any pauper class is elevated above the condition of the independent laborers, the condition of the indepndent class is deprived; and industry is impaired, and employment becomes unsteady, and its remuneration in wages is diminished. Such persons, therefore, are under the strongest inducements to quit the less eligible class of laborers and enter the more eligible class of paupers."

Coll, *Perspectives in Public Welfare; The English Heritage*, Welfare in Review, March 1966, Volume 4, No. 3, page 1; Abbott, *From Relief to Social Security* (1941) 262-72.

Following the White House Conference of 1909, a number of states undertook to institute programs of Mothers' Pensions, usually confined to families where the absence of the father was due to his death. By 1922, forty-three states had made some statutory provisions for aid to chil-

dren in their own homes, of these 35 established monthly allowance figures by statute. In spite of the fact that grants per child were on the order of $5.00 to $20.00 per month, ten states, at that early date, saw fit to impose family maximums — ranging from $25.00 in West Virginia to $60.00 in Oregon.[1] See Eckman, *Public Aid to Children in Their Own Homes*, (U. S. Dept. of Labor, Children's Bureau, Legal Chart No. 3, 1923). In Maryland, a $40.00 maximum was imposed by Chapter 670 of the Acts of 1916, which remained part of Maryland law until enactment of Chapter 401 of the Acts of 1929, which relegated need standards to determination by county boards. By 1934, 46 states had mothers' pension programs; the majority of them imposed family maximums. See Abbott, *supra* at 276-77. In 1934, the Report of the (federal) Committee on Economic Security, adopting a recommendation of the Children's Bureau, recommended a federal ADC program. Cohen, *Factors Influencing the Content of Federal Public Welfare Legislation*, 1954 Social Welfare Forum 199, 205; 209 (1954). "[T]here was very little interest in Congress in ADC. . . . The fact that the committees of Congress limited the original Federal share to one third, placed relatively low limitations on the amount of Federal aid per child and omitted any federal sharing for the mother or adult caretaker reflected the degree of the prevailing interest in the program." The bill drafted by the Committee on Economic Security provided for a closed-end appropriation. It "recognized that there would be waiting lists in that it provided that a state would have to file an annual statement of the number of children on the waiting list to receive assistance. The bill did not define what 'assistance to children' meant." Cohen, *supra*, at 205. Congress

[1] These states included Kansas, Louisiana, Maryland, Missouri, Montana, Nebraska, Nevada, Oregon, Utah, and West Virginia.

eliminated the closed-end appropriation, but otherwise engrafted further limitations on the Committee on Economic Security bill. Thus, the federal share of matching was, at the suggestion of Congressman (later Chief Justice) Vinson, limited to $18.00 a month for the first child, and $12.00 for each additional child, regardless of actual or state-determined need. "These figures were obtained by review of the Federal pensions provided for widows and children under veterans legislation of which the Ways and Means Committee at that time had jurisdiction. But whereas the veterans schedule then provided $30.00 for two children where there was no widow and increased the amount to $46.00 where there was widow, the committee did not include any payment for the mother under ADC. It was not until 1950 — fifteen years later — that this defect was corrected." Cohen, *supra*, at 205. Further, "[t]he 'decency and health' plan requirement was deleted from the legislation, primarily due to the criticism from members of both the House and Senate Committees that this would give the Federal authority the right to set standards relating to amount of assistance." Cohen, *supra*, at 206. These limitations were recognized by this Court in *King v. Smith*, 392 U.S. 309, 334, referring to the states' "undisputed power to set the level of benefits *and* the standard of need." (Emphasis added), and in *Rosado v. Wyman* where the court recognized "the traditional federal policy of granting the states complete freedom in setting the level of benefits". 414 F. 2d 170, 179 (2d Cir. 1969) and see *Lampton v. Bonin*, 299 F. Supp. 336, 342-43 (E.D. La. 1969).

In Maryland, establishment of benefit levels following implementation of AFDC by Chapter 148 of the Acts of 1936 was initially a function of the county boards, some, at least, of which imposed maximum grant requirements. The state first set the maximum amount for grants early

in 1944 and the suggestion that the ceiling be removed was first made at the meeting of the State Board of Public Welfare on February 2, 1945 (Minutes, A. 127-28). Prior to this time, State ADC grants were limited to the federal maximum grant with some local supplementation from general assistance funds. Subsequently, commencing on July 1, 1947, in consequence of requirements imposed by federal regulations, the State imposed statewide needs standards, including a maximum grant regulation providing for a maximum grant of $170.00 per month for families of eleven or more persons (Rule, A. 113). Subsequently, protests were received from local boards.

> "Several of the local governments were finding it difficult to accept the principle of State standardization of grants even with adjustment of those standards for different areas of the State.
>
> This reluctance apparently stemmed from the interpretation by a number of local board members, county officials and citizens that the program should not be one having as a part of its purpose the lifting by money alone of the standard of living of the people receiving public assistance. The opinion was general that living on public assistance cannot be a satisfactory way of life and should not be made as attractive or profitable as earning a living.
>
> The Department's approach to the objective of its service recognizes public assistance as only a temporary arrangement for the recipient while some permanent plan for self-support is being worked out by him with the assistance of the welfare agency. Towards fully accomplishing such objective, the need is recognized for continual improvement in developing a plan which will get the social worker onto the case immediately to help the recipient wherever possible to make use of some solution other than public assistance; or to continue working on the case to see that a solution is found as soon as possible.
>
> The Department regards these as criteria for measuring the degree of efficiency in accomplishing the

objective of the service. But it is not satisfied that it has the answer to this problem in all parts of its present procedure. For example, during recent months it has been critically testing its methods in dealing with Aid to Dependent Children cases in the belief that present methods do not offer enough stimulation to the recipient to improve her circumstances.

* * * * * *

On the whole the Department appears to have weighed carefully the differences existing in areas of the State and to have made use of proper data responsibly in developing the standards adopted. Attention now is being given them towards revision where necessary. A part of this problem is to keep the public assistance grant from exceeding the earnings available to a comparable family which is self-supporting.

* * * * * *

When postwar conditions brought about an increase in the number of new cases, the State, in order not to withhold assistance from eligible applicants, withdrew from the case grants all but four essential items (food shelter, clothing and household maintenance), and placed a ceiling on the total grant allowable. This released enough funds to absorb incoming cases without creating a waiting list or creating a deficit. This policy is sound and practical in that it does not withhold assistance from anyone who can satisfy eligibility requirements strictly applied.

Ceilings are now being reexamined in the light of experience and present conditions.

Consideration of the allowances for the various items included in a public assistance grant does not indicate that it affords more than minimum subsistence. The grant allowed has not been adjusted closely to the cost of living, and moreover there are excluded at present items which are part of the customary expenditures of persons of even the lowest income group. Nevertheless, in some areas of the State the maximum grant allowable, even on the present basis, was deemed by the local authorities to be excessive for the recipient's normal pattern of living.

> The belief is widespread among county boards, and there is some evidence tending to confirm it, that meagerness of grant is serving successfully as an incentive for recipients' regaining self-support. It is felt that the recipient, once on the welfare roll, has a tendency to relax and develop the attitude that the government owes him a living, and that, furthermore, too many of the recipients fail to appreciate what they are able to obtain with so little effort.
>
> To combat such tendencies, the belief was held that for the good of Maryland as well as of the recipients, public assistance should not pamper or indulge the recipient; the aim should be to help them regain responsible control of their affairs." (*Report on the Department of Public Welfare*), (Maryland) Commission on Governmental Efficiency and Economy (1948), (A. 165, 173-74, 179, 180-81).

In consequence of these objections, the counties were classified into four groups beginning on July 1, 1948, with allowable maxima for families of eleven (11) or more ranging from $159.00 to $170.00 in the various county groups (Rule, A. 112-113). Beginning on October 1, 1948, the maximum grant prescribed was for families of ten persons or more and ranged from $165.00 to $176.00 in the various counties (Rule, A. 111-112). On February 21, 1950, the maximum grants for families of ten or more were reduced to amounts ranging from $147.00 to $159.00 (Rule, A. 108). On January 31, 1952 flat maximum grants applicable to families of all sizes were initiated, the allowable sums ranging from $145.00 to $165.00 depending on the county. Beginning in October 1952 a uniform state maximum applicable to families of all sizes of $175.00 (subsequently increased to $180.00) was imposed (Rule, A. 105-107).

In 1956 and again in 1958 the regulation underwent intensive administrative review, data being collected on the

costs of eliminating the regulation and on average weekly wages for state-insured employment, for production workers in manufacturing industry, and for farm labor, on average disposable income after taxes, and on the attitudes of county boards (Minutes and Attachments, A. 130-144). On October 1, 1958 local variations based on differing shelter costs were again authorized, the authorized grants ranging from $190.00 to $210.00 depending on the county (Rule, A. 104-105). This limit was adopted after objections by some county boards to elimination of a maximum. In a communication (A. 143-144) to county boards dated June 27, 1958, the Director of the State Department of Public Welfare noted that "(S)ince 1952 we have had one overall maximum on an assistance grant, thinking that an assistance grant should not go higher than the lower wages in the community." The former Supervisor of Plans and Standards of the State Department of Public Welfare (A. 194) recalls:

> ". . . that these maximum grant regulations consistently have received Federal approval, I also recall that one factor giving rise to these regulations was the strong feeling on the part of many county boards, particularly during the period following adoption of statewide need standards in 1944 that public assistance payments should not exceed the earnings of the head of a family when off assistance and that the income of a public assistance recipient should not exceed that of his employed neighbors.
>
> I recall that at various times during the early years following the introduction of the maximum grant regulation, the State Department of Public Welfare secured information as to wage levels from the State Employment Service and that the information thus secured was utilized in establishing maximum grant levels."

These figures were progressively increased to the $240.00-$250.00 limits now under attack.

While the State Department of Public Welfare unsuccessfully sought elimination of the maximum grant regulation in its budget requests beginning in 1967, such request were not transmitted to the Legislature in the Governor's budget (see Maryland Const., Art. III, Sec. 52) and at least one legislative committee expressed concern that even the existing maximum grant level operated as a disincentive to employment and as an incentive to desertion by wage earners;

> "In the General Public Assistance-Employable category, which as the title implies, involves those individuals who are temporarily unemployed and without resources, the cost has risen from $35,348 to $266,740 or 654.6% between 1956 and 1965. The number of families assisted under this program has increased from 40 in June of 1956 to 240 in June of 1965, an increase of 500%.
>
> During an era of the highest economic activity this country has ever known, this rate of rise in employable individuals is almost unbelievable. Even though, as the Department of Welfare pointed out, this is not a static group containing the same individuals and the fact that they have been able to attain a turnover rate of approximately 70% of the individuals in it, the Committee finds it difficult to believe that everyone in this group is actively seeking employment. Here again the welfare policy on the amount paid is believed to be partly responsible for discouraging these individuals from seeking employment.
>
> For example, a family of five would be entitled to receive the maximum grant of $237.50 per month plus free medical care and hospitalization. If the family provider were working, he would have to receive an income higher than the grant to satisfy his costs of working, i.e., transportation, clothing, lunches, etc. in addition to such fixed deductions as Social Security, City Earnings Tax, etc., which would require him to earn approximately $300.00 a month to equal his welfare payment. If, because of his lack of education or

training and experience, he cannot command more than $60.00 a week, or $260.00 a month, he is not inclined to obtain employment since he can get almost the same amount by remaining idle. If he is found to be unwilling to accept employment, the Department of Welfare can stop his public assistance payments. It is conceivable that in such instances, he would seriously consider 'deserting' his family so that they could continue to receive the maximum grant and then accept employment at whatever salary he is able to obtain thus increasing his family income substantially. At the same time, the family, as a group, are held at almost the poverty level and find it difficult to improve their lot. The father image is gone and the children, without the guidance they need, cannot be blamed for developing a resistance to established authority and becoming juvenile delinquents, thus continuing the poverty cycle." Maryland Legislative Council, *Report to the General Assembly of 1967, (Report of the Legislative Council Committee on Public Welfare Cost,* October 1966). (A. 147, 158-159).

Each and all of the approximately 20 versions of the maximum grant regulation were submitted to, and accepted for incorporation in the State Plan (e.g. A. 183-193) by the Department of Health, Education and Welfare (Stipulation, A. 213-214). Each such acceptance constituted a finding by the federal authorities that the state maximum grant regulation plan was in accord with the requirements of the Social Security Act, including 42 U.S.C.A., §602 (a) (g). See 42 U.S.C.A., §602 (b); Department of Health, Education and Welfare, *Handbook of Public Assistance Administration,* Part VII, Section 1100, pp.1-15, 57-63; cf. *King v. Smith,* 392 U.S. 309, 317, 326, 337 and nn. 11 and 23 and 45 C.F.R. §201.3 on the significance of acceptance and incorporation of regulations, and see, Dept. of Health, Education and Welfare, *Public Assistance Under The Social Security Act* (1966) at p. 11

where action on state plans and amendments is explained thusly;

> "A State wishing to obtain Federal funds for one or more of the public assistance programs submits, for each, a State plan describing the pertinent aspects of its program operations.
>
> The Bureau analyzes the State plan, determines whether it meets the requirements of the Social Security Act, and recommends approval or disapproval to the Commissioner of Welfare. Similarly, the Bureau analyzes amendments to State plans and then takes action to approve such amendments on the basis of policy statements or precedent material previously approved by the Commissioner or recommends disapproval to the Commissioner.
>
> The Bureau of Family Services representatives in the nine regional offices are responsible for review and recommended action on State plans. They have authority to act on most plan amendments, submitted by the States, that are in accord with established policy.
>
> In this process, the Bureau works with the States to clarify any questions of compliance and to improve programs. States frequently submit plan material in draft for review and comment, and thus many questions are resolved before its official submittal. Official action is taken only on material officially submitted and is based only on determination as to compliance with Federal requirements; approval may not be withheld on the basis of questioned provisions that are not in conflict with Federal requirements."

The Department of Health, Education and Welfare, beginning in 1961 and continuing annually to date, issued an annual informational release entitled *State Maximums and Other Methods of Limiting Money Payments to Recipients* (A. 120) listing maximum grant regulations in some twenty-seven states. See also Sparer, *Social Welfare Law Testing*, 12 Prac. Law. 13, 21 (1966). These compilations

indicate that the Maryland maximum is one of the highest state maximums and bears a clear relationship to the minimum wage rate;[2] the other family maximums ranging downward to the $81.00 maximum applicable until recently in Florida.

The present action was instituted on February 28, 1968. The district court denied the State's motion to dismiss in its oral order of June 25, 1968 (A. 83-87). The complaint asserted the invalidity of the regulation under Article 88A, Sections 44A and 49 of the Maryland Code as well as under the Federal Constitution and Social Security Act. Notwithstanding this fact, the district court denied the State's Motion to Dismiss on the basis of the doctrine of equitable abstention.[3] Clearly, a decision that the uncon-

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[2] As at February 25, 1969, the date of the supplemental opinion of the court below, the weekly minimum wage (based on a 40 hour week) was $52-64 under the federal law (29 U.S.C.A. §206) and $46-52 under the state law (Md. Code Ann. Art. 100, §83). At the date of the court's initial opinion, the federal minimum wage was $46-64 and the state minimum wage $46. Welfare payments are of course tax-free. See 1938-2 Cum. Bull. 136; 1957-1 Cum. Bull. 26; Md. Code Ann. Art. 81, §280. In addition, recipients are generally eligible for medical assistance and other forms of assistance in kind, such as low-cost public housing and the food stamps received by the plaintiff Williams (Stipulation, A. 71).

[3] The doctrine of abstention is properly raised by a Motion to Dismiss. *Government & Civic Employees Organizing Committee v. Windsor*, 353 U.S. 364 (1957); *Shipman v. Du Pre*, 339 U.S. 321 (1950), compare *Steinbach v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949). Similarly, the state's motion to dismiss on Eleventh Amendment grounds was denied, notwithstanding the fact that the suit was only in form a suit for negative injunctive relief. As recognized in *Rosado v. Wyman, supra:*

> ". . . whatever the technical consequences of enjoining enforcement . . . may be, the practical effect of an injunction is to order the New York legislature to appropriate more funds for welfare.
>
> A federal court should not assert such power over a state legislature unless there is no possible alternative . . ."

414 F. 2d at 176. Compare *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51-52 (1944); *Hawaii v. Gordon*, 373 U.S. 57 (1963).

strued Maryland statutes barred the regulation would have avoided the grave constitutional question, rendering abstention appropriate in favor of state judicial remedies under the doctrine of *Harrison v. N.A.A.C.P.*, 360 U.S. 127 and *Zwickler v. Koontz*, 389 U.S. 241. Abstention was nevertheless denied, notwithstanding the inapplicability of *Damico v. California*, 389 U.S. 416 and *King v. Smith*, *supra*, which related only to abstention in favor of state *administrative*, not judicial, remedies. See *Boone v. Wyman*, 295 F. Supp. 1143, 1151 (S.D. N. Y. 1969).

On December 13, 1968, the district court rendered its initial decision (A. 87) invalidating the regulation under both the Equal Protection Clause and Section 402 (a) (9) of the Social Security Act. On December 23, 1968, the Defendants filed a motion for reargument, etc. (A. 100), under Fed. R. Civ. P. 52 and 59; on February 25, 1969 a supplemental opinion (A. 238) was filed in which the district court retracted its finding of invalidity under the Social Security Act and found the regulation void under the Equal Protection Clause only for "overbreadth" (Supplemental Opinion, A. 253-256). In retracting with some reluctance its finding of invalidity under the Social Security Act, the court relied upon the implied recognition of maximum grant regulations in Section 402 (a) (23) of the Social Security Act (42 U.S.C.A. §602 (a) (23), added by Section 213 (b) of Public Law 90-248. The district court referred to this amendment as "inexplicable". (Supplemental Opinion, A. 246). But apart from the fact that, as already noted, Congress had on several previous occasions expressly recognized state maximum grant regulations (see e.g. Cohen and Ball, *The Public Welfare Amendments of 1962*, 20 Public Welfare 191, at 229-30 (1962), (A. 218-219), and apart from the fact that 42 U.S.C.A. §602 (a) (9) on which the court originally

relied for a conclusion of invalidity had the very limited purpose of eliminating state waiting lists,[4] it is clear that §602 (a) (23) is not an "inexplicable" sport in the law. Section 602 (a) (23) resulted from an effort on the part of the then administration to secure enactment of a provision which *would* have invalidated state maximum grant regulations, as well as fraction-of-need regulations, by requiring all states to fully meet state-determined need and to adjust payments upward to reflect increases in the cost of living. See *President's Proposals for Revision in the Social Security System*, Hearings before the Committee on Ways and Means, House of Representatives, 90th Congress, 1st Session, part 1, pages 6, 59-60 (1967) (A. 219, 227-231); Committee on Ways and Means, *Section-by-Section Analysis * * * of H.R. 5710 * * * prepared and furnished by the Department of Health, Education and Welfare*, 118 (1967) (A. 234). Rather than adopting this proposal, Congress confined itself to accepting that portion of it relating to cost-of-living increases in existing maximum grant levels and declined to require the states to otherwise fully meet state-determined need.

In interpreting Section 602 (a) (23) the Second Circuit found in part

> "We believe that Section 602 (a) (23) was not intended to have anything like this broad a scope. We read it as making two far less dramatic changes in the law. First, it requires each state to make an adjustment in its standard of need by July 1, 1969, to reflect changes in the cost of living, but does not require any state to pay its standard of need, nor to increase its AFDC payments or to refrain from decreasing them. The second change required by the statute was not

[4] See Cohen, *Factors Influencing the Content of Federal Public Welfare Legislation*, 1954 Social Welfare Forum 199, 205, 209 (A. 216-217), and see 1950 U.S. Cong. & Adm. News, 3470-71, 3507 (House Committee report on §602 (a) (9)) and 95 Congressional Record 13934 (1949) (Remarks of Representative Forand).

intended to affect New York at all. It refers to a practice employed in many states, not including New York, of imposing a maximum on the amount of aid a family may receive, regardless of its size. The statute requires that family maximums of the type imposed by these states are to be adjusted by July 1, 1969, to reflect changes in the cost of living.

Our construction of Section 602 (a) (23) finds support in the rejection by Congress of the much more stringent bill originally proposed. That rejection demonstrated an intent not to impose controls on the levels of benefits set by the states. The Congressional action was entirely consistent with the traditional federal policy of granting the states complete freedom in setting the level of benefits. See *King v. Smith*, *supra*, 392 U.S. at 318-19, 334.

The Conference Report on Section 213 of the bill, which contained the version of Section 602 (a) (23) that was enacted, indicates the correctness of a narrow interpretation. In discussing the portion of the pre-Conference version of Section 213 that dealt with certain non-AFDC recipients, the Report states that the Section would have required 'each state to adjust its standards for determining need, the extent of its aid or assistance, and the maximum amount of the aid or assistance payable,' and thus mandated an increase in aid. However, in explaining the portion of Section 213 that, except for a change from an annual cost of living adjustment to a single such adjustment, became Section 602 (a) (23), the Report states only that the bill would require each state to 'adjust its standards so as to reflect current living costs and make proportionate adjustments in any maximums on the amount of aid.' Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967), reprinted in (1967) U.S. Code Cong. and Admin. News 3179, 3208-09. * * *" *Rosado v. Wyman*, 414 F. 2d 170, 178-179 (1969).

It is hard to see how Congress could have said more clearly that it regarded maximum grant regulations as permissible under the Social Security Act. Appellees reliance on the preamble and general purpose of the 1935 Act is clearly

misplaced, "... we must consider the Social Security Act as it exists today, not as it was written thirty-four years ago." *Lampton v. Bonin*, 299 F. Supp. 336, 340 (E.D. La. 1969). The challenged regulation, with its foundation in the principle of less benefit, is fully in accord with the thrust of the AFDC provisions as amended in 1967. The Administrator of the Social and Rehabilitation Service of HEW has stated that "more explicitly than ever before, this legislation [the 1967 Amendments] constitutes a national commitment to the concept that children are better off growing up in a home where work and wages are the principal source of the family's support" Switzer, "The New Social and Rehabilitation Service", Public Welfare, Volume 26, No. 1, January 1968, pages 17, 19. By reason of the district court's failure to abstain and the clear validity of the regulation under the Social Security Act, this Court is now squarely confronted with the issues under the Equal Protection Clause.

## ARGUMENT

### I.

### A STATE REGULATION IS NOT SUBJECT TO INVALIDATION *IN TOTO* FOR "OVERBREADTH" UNLESS A FIRST AMENDMENT OR SIMILAR QUESTION REQUIRES DETERMINATION OF THE VALIDITY OF THE REGULATION ON ITS FACE.

As previously noted, approximately twenty states have maximum grant regulations similar to the Maryland regulation. Until the decision in the instant case, the validity of such regulations under the federal constitution and statutes had been generally assumed.[5] Since the decision,

[5] The 4-3 decision of the Supreme Court of Iowa in *Collins v. State Board of Social Welfare*, 248 Iowa 369, 81 N.W. 2d 4 (1957) invalidating a regulation under the equal protection clause of the Iowa constitution does not supply authority to the contrary. The standards applied by the Iowa court in reviewing state economic legislation are far more stringent than those applied by this court. See e.g., *Bulova Watch Co. v. Robinson Wholesale Co.*, 252 Iowa 740, 108 N.W. 2d 365 (1961).

federal courts in Arizona (*Dews v. Henry* and *Inclan v. Dept. of Public Works*, 297 F. Supp. 587), (D. Ariz. 1969), California (*Kaiser, et al. v. Montgomery, et al.*, No. 49613, N.D. Calif., decided August 28, 1969), Maine (*Westberry v. Fisher*, 297 F. Supp.1109, (D. Me., 1969) and Washington (*Lindsey, et al. v. Smith, et al.*, No. 7636, W.D. Wash., decided August 20, 1969) have invalidated state maximum grant regulations in reliance on the instant case. In those cases, unlike this one, the sole ground urged in support of the regulations by the State Attorneys General was their character as fund-savings measures. Litigation attacking state maximum grant regulations is pending in the District of Columbia, Georgia, Louisiana, Mississippi, Texas and West Virginia, among other jurisdictions. The estimated cost to the State of Maryland of removal of the maximum grant regulation (assuming no proportionate reduction of other grants such as that carried out in Florida, see 16 Welfare Law Bulletin 4 (1969)) is on the order of $1,440,000 per year (Affidavit in Support of Application for Stay). Even larger amounts are involved in other states, and the sums involved will be drawn almost entirely from state funds, since the existing federal matching grants are already paid with respect to each child in the family regardless of state limitations on aid to large families. (See 42 U.S.C.A. §603 (Testimony of Thomas Schmidt A. 79-81)).

In the event an appropriation by the legislature is not forthcoming or surplus funds are not available from the present welfare budget, implementation of the decision of the court below would require a uniform reduction in welfare payments to the entire class of welfare recipients generally, some 140,000 persons, including the aged, blind, disabled, etc. (exclusive of foster care recipients), in an amount approximating 4% of each grant (Affidavit in Support of Application for Stay).

The court below, while recognizing the rationality of maximum grant regulations affecting employable persons (Supplemental Opinion, A. 255) found the regulation in its entirety invalid for "overreaching". It thus gave the named plaintiffs, whose situation was highly exceptional,[6] standing to attack the regulation "on its face". The court below also seriously misstated the proportion of AFDC recipients who were potentially employable, equating employability with the AFDC-U category. (Supplemental Opinion, A. 254). Compare Warren and Berkowitz, *The Employability of AFDC Mothers and Fathers*, Welfare in Review (July-Aug. 1969) at p. 1. The court below cited the Senate Report (No. 744, 90th Congress, 1st Session) on the 1967 work incentive amendment as embodying a congressional judgment that mothers of pre-school children, and mothers generally, were not eligible for referral under work incentive programs (A. 255, n. 14). But the Senate's judgment was rejected in conference and in the final bill. "The conference agreement contains the provisions of the Senate amendment, with amendments * * * (3) eliminating mothers and other relatives who care for pre-school children or children under 16 attending school from the specified classes of persons for whom referral under the program is declared to be inappropriate." Conference Re-

[6] The Williams parents were a disabled mother and an absent father; the Gary parents were both disabled. The typical AFDC situations — an ablebodied mother and absent or disabled father, were conspicuously unrepresented, and the court below, in "vetoing" the regulation *in toto*, made no inquiry into the dimensions of the class represented, noting only that its "substantiality . . . is not disclosed" (Supplemental Opinion, A. 256). Nothing in this Court's first amendment cases or in Rule 23 justifies this approach to state economic legislation. It is clear that Appellees, at the very most, have made out a case for a declaratory judgment limited to themselves or the aforementioned exceptional subclass of cases where both parents are dead, absent and/or incapacitated. See Fed. Rule Civ. P. 23 (a) (3) and 23 (c) (4) (B).

port No. 1030, 90th Congress, 1st Session, 2 U.S. Code Cong. & Adm. News 3204 (1967). A justification for the amendment to the Senate's amendment was well stated by Dr. Genevieve W. Carter of HEW's Social and Rehabilitation Service.

"* * *.

*In 20 States representing about 25 percent of the national AFDC caseload, the amount of assistance a family may receive is limited by setting maximum payments substantially below the family's need* or by meeting only a percentage of the family's deficit determined by the State's budgetary standards.

*In these States there is in effect, a work incentive because income from employment may be used to supplement the assistance payment and to make up the difference between the maximum AFDC monthly payment and the family's total requirements, as defined by the State.*

* * * * * *

*Data from the 1961 characteristics study showed that more AFDC mothers were employed in the States with employment incentives than in States that did not permit earnings to supplement the AFDC payment.* To illustrate, the national average of all AFDC mothers employed full-or part-time during the survey month of November or December was 14 percent. In States where limited payments resulted in earnings exemptions, the median proportion of mothers employed was 22 percent (Florida had a high of 44 percent). In only six of the 25 States allowing an earnings exemption was the proportion of mothers employed below the national average. In contrast, among the States not having this kind of payment limitation, and therefore no earnings incentive, the highest proportion of mothers employed was 13 percent and the median percentage for these States was about 6 percent.

As long as the job opportunities open to these mothers are a part of the irregular economy, episodes

of dependency can be expected to occur just as episodes of illness among aged persons can be expected to reoccur in the Medicare program. The objectives of an employment support program would be to reduce the frequency and duration of these episodes in recognition of the interplay between AFDC programs and the irregular job market. (Emphasis added.)

* * * * * *"

Carter, *The Employment Potential of AFDC Mothers*, 6 Welfare in Review No. 4, 1, 8-9 (1968).[7]

Decisions of this court make clear that state economic legislation, unlike legislation involving first amendment rights, is not subject to attack "on its face". See *Shelton v. Tucker*, 364 U.S. 479, 488 n. 8 and authorities there cited, and cf. *Louisiana v. N.A.A.C.P.*, 366 U.S. 293, 296-97; *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 307-08 on the First Amendment basis of the "void for overbreadth" rule. See generally, Comment, *Judicial Rewriting of Overbroad Statutes*, 57 Calif. L. Rev. 240-241 (1969), where it is noted:

"The concept of overbreadth is a relative newcomer to the corpus of constitutional law. As first enunciated in the United States Supreme Court decision of *Brown v. Louisiana* (383 U.S. 131 (1966)), and further developed in such decisions as *Elfbrandt v. Russell* (384 U.S. 11 (1966)) and *United States v. Robel* (389 U.S. 258 (1967)), the doctrine was meant to apply only in the limited area of first amendment adjudication. It constituted nothing more than the Court's recognition that when the terms of a statute affecting first amendment rights sweep so broadly as to proscribe not only unprotected, but also constitutionally

[7] Under the President's new welfare proposals only the welfare mother of *pre-school age* children does not face benefit reductions if she chooses not to work, but job training, jobs and day-care centers should be made available for those who can, and wish to work. President's Message on Welfare Reform 8 U.S. Code Cong. & Adm. News 1233, 1237 (Sept. 20, 1969).

> protected conduct, such a statute is incompatible with our tradition of uncompromising deference to these 'preferred' freedoms."

Nor are there any "rights under federal law to any particular level of AFDC payments or, indeed, to any payments at all. See *New York v. Galamison*, 342 F. 2d 255 (2d Cir.), cert. denied, 380 U.S. 977 (1965); *Bradford Audio Corp. v. Pious*, 392 F. 2d 67 (2d Cir. 1968)." *Rosado v. Wyman*, 414 F. 2d 170, 177-78 (2d Cir. 1969). It is plain that the maximum grant regulation cannot be deemed invalid even as applied to the named plaintiffs. See *Purity Extract Co. v. Lynch*, 226 U.S. 192, 204; *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83, *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911). The trial court plainly erred in rejecting, without discussion, the objection to a broad decree raised by defendants on reargument.

## II.

### THE ASSUMPTIONS AS TO THE EFFECT OF THE MAXIMUM GRANT REGULATION, UPON WHICH THE DISTRICT COURT BASED ITS FINDING OF INVALIDITY, ARE ENTIRELY UNSUPPORTED BY THE RECORD.

The court below referred repeatedly to the supposed effects of the maximum grant regulation, which was said to be "uniformly applied * * * to encourage the disbanding of large families" (Supplemental Opinion, A. 251), to have "pernicious results" (Supplemental Opinion, A. 251), and to "subvert the statutory goal of preserving intact the family unit" (Supplemental Opinion, A. 254). Similar charges might of course be levelled at the state practices expressly authorized by 42 U.S.C.A. §604 (b), permitting the states to terminate AFDC assistance to children in unsuitable homes if, as here, state welfare programs make available payments to the child in a foster home or elsewhere. *King v. Smith*, 392 U.S. at 324. But both the record

and the published social science literature appear utterly bare of evidence that maximum grant regulations have in fact resulted in family disintegration in consequence of the banishing of children of large families from the home in order that they may secure added benefits in foster homes or the homes of other relatives. Rather it is a fair inference that in the vast majority of cases, including, as stipulated, the appellees' own cases, the children of large families remain in the home, supported, perhaps, less adequately then they otherwise might be, but in the home nonetheless. The court's finding of factual subversion of family relationships on the basis of a syllogism drawn from the statutory framework is reminiscent of the judicial techniques used in invalidation of much early social legislation. Nothing in the record in this case warrants the court in indulging the presumptoin that the total effect of the regulation is to impair family relationships. Indulgence of such a presumption is inappropriate in cases of this kind.

> "Many case have been, and perhaps will continue to be, decided upon the theory that constitutional facts are adequately revealed by judicial notice or even by judicial assumption. One cause for this attitude may be that, however sharp it is drawn to clarify discussion, the borderline between constitutional facts and law is usually vague and indefinite. Another factor is the inevitable cast of the individual mind, leading some jurists to defend such abstract concepts as 'liberty of contract' by a priori reasoning. And the habit of mind induced by freely manipulating questions of fact as if they were questions of law is not an easy one to overcome. But the trend is toward distinction."

Comment, *The Presentation of Facts Underlying The Constitutionality of Statutes,* 49 Harv. L. Rev. 631, 638-39 (1936), and see Laski, *Judicial Review of Social Policy in England,* 39 Harv. L. Rev. 832, 842 ff. (1926). While the

published literature contains no evidence that exiling of children and consequent family disintegration is an effect of maximum grant regulations, there is a substantial body of literature and contemporary discussion dealing with the phenomenon of "welfare desertion"[8] which points to a precisely opposite conclusion — that in jurisdictions with high benefit levels not imposing maximums, the availability of AFDC payments in excess of wage levels to broken but not intact families has operated as an inducement to employed fathers to desert their families in order to render them eligible for benefits in excess of the wage rate. Thus, a leading text on social security, Burns, *Social Security and Public Policy* (1956), observes:

> "Many people still tend to envisage ADC as a program for widowed mothers. But with the expansion of OASI an ever larger proportion of survivor families is provided for on OASI and the proportion of ADC families in which the father has left the home has steadily increased . . . In about half of the cases the need of the child was due to the fact that the father had deserted the mother, was not married to her, or was otherwise absent from the family . . . Especially in communities where the ADC are relatively generous, this has given rise to the charge that the program makes desertion all too easy for fathers in whom the sense of family responsibility is weak, for they well know that their family will nonetheless be taken care of." *Id.* at 86.

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[8] The district court's treatment of the welfare desertion problem is found at A. 253-254: "A parent who is willing to desert to give his children or his family eligibility for AFDC on this basis can hardly be presumed to voice stringent objection to further breakup of the family unit to gain advantage from this unusual aspect of the maximum grant regulation. Thus, the maximum grant regulation not only subverts the statutory goal of preserving intact the family unit, but it is also ineffective to discourage eligibility by continued absence from the home." This would not seem in fact or logic a sufficient answer to the state's position that removal of the maximum grant would operate as an incentive to desertion.

The Burns treatise also notes that:

> "It is even possible that a parent who took very seriously his financial obligations to his family might find that if he is in a low-paid occupation, has a large family, and lives in a community paying relatively generous ADC allowances, he could secure a higher standard for his family by deserting than by remaining at home on his job." *Id.* at 87 n. 16.

Resort to sociological treatises is not necessary in search of evidence demonstrating the existence of "welfare desertion," daily newspapers are replete with such evidence. Thus a local government official has sought new or improved welfare programs which will "encourage men to stay on the job, not to drift away and abandon their family" New York Times, Feb. 24, 1969, 40:4; The N. Y. Human Resources Administrator has proposed of a joint federal-state study to determine the extent to which low-income fathers abandon their families to get extra income from welfare, there being "no question (that) this is a problem" New York Times, Mar. 20, 1969, 48:1; and the chairman of the President's Commission on Income Maintenance Programs, has condemned " 'the anomalous and inequitable situation in which families with dependent children, where a male head has deserted may receive more total income than intact poor families headed by fully employed workers ineligible for income supplements' " New York Times, Mar. 21, 1969, 44:2. Indeed, it is well known that the "absent-parent" category makes up the lion's share of AFDC cases; and is the fastest growing AFDC category. In appraising the effects of welfare regulations on family solidarity, the state was surely entitled to address itself to the most pressing evil. Cf. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *McDonald v. Bd. of Election Commrs.*, 89 S. Ct. 1404, 1409 (1969).

## III.

### THE PROPER STANDARD OF REVIEW TO WHICH THE REGULATION MUST BE SUBJECTED IS WHETHER IT STANDS ON SOME RATIONAL BASIS.

This Court has recognized "a state purpose to encourage employment" as an "admittedly permissible" state objective in the design of welfare programs. *Shapiro v. Thompson*, 89 S. Ct. 1322, 1331, 1333 (1969). Under the *Shapiro* rule, since the classification here does not touch on any independent fundamental right, such as that of interstate movement, the traditional standard of whether the regulation is "without any reasonable basis" (*Shapiro v. Thompson, supra* at 1333 n. 20; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), see also *Flemming v. Nestor*, 363 U.S. 603 (1960); *Snell v. Wyman*, 281 F. Supp. 853 (S.D. N.Y. 1968), affd. 89 S. Ct. 533 (1969)) is applicable. The elaborate "psychoanalysis" of the legislative body carried out by the district court (Supplemental Opinion, A. 252-253, Initial Opinion, A. 97-98) is inappropriate under this standard, see *United States v. Constantine*, 296 U.S. 287, 298-99 (1935) (Cardozo, J.), since "(l)egislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them". *McDonald, supra*, 89 S. Ct. at 1408 and see *Snell v. Wyman, supra*, in which Judge Frankel in considering the involved and somewhat irrational repayment provisions of the New York Welfare Law said:

> "We sketch these countervailing points for the single purpose of indicating what seems plain to us — that we could hold the statutes unconstitutional only if we were invested by the 'convenient vagueness' of the Due Process Clause with a power, long since denied us, to invalidate state laws 'because they may be unwise, improvident, or out of harmony with a par-

ticular school of thought'. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, 75 S. Ct. 461, 464, 99 L. Ed. 563 (1955); (Citations omitted).

To be sure, cases like those just cited reflect mainly the recognition of our highest Court during the last thirty years or so that it does not sit as final arbiter of state social policies affecting matters of business and industrial regulation. (Citations omitted).

And, it is said, the subject of welfare administration, where the primitive needs of desperate people are at stake, is altogether different. There is a difference, certainly, but not a constitutional one — not any that commissions us to tell those the people elect how they should resolve competing values of the kind here is question." (281 F. Supp. at 862-63).

* * * * * *

"Like the life of the law generally, the Fourteenth Amendment was not designed as an exercise in logic. It is ancient learning by now that a classification meets the equal protection test 'if it is practical, and is not reviewable unless palpably arbitrary'. *Orient Insurance Co. v. Daggs*, 172 U.S. 557, 562, 19 S. Ct. 281, 282, 43 L. Ed. 552 (1869). If the classification has 'some reasonable basis', it cannot be held offensive to the Equal Protection Clause 'because it is not made with mathematical nicety or because in practice it results in some inequality'. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911). 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific'. *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S. Ct. 441, 443, 57 L. Ed. 730 (1913).

"Measured against such familiar teachings, plaintiffs' arguments verge upon (or reach) the frivolous . . ." (281 F. Supp. at 865-66).

* * * * * *

The rules by which the maximum grant regulation is to be tested are:

> "1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. (Citations omitted". *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

Clearly, plaintiffs below did not "carry the burden of showing that (the regulation) does not rest upon any reasonable basis but is essentially arbitrary," cf. *McDonald v. Bd. of Election Commrs., supra; Morey v. Doud*, 354 U.S. 457 (1957); and see *Lampton v. Bonin*, 299 F. Supp. 336, 342 (1969).

## IV.

### THERE ARE AT LEAST FOUR RATIONAL BASES UPON WHICH THE MAXIMUM GRANT REGULATION STANDS.

The state was entitled, in the interest of providing work incentives and avoiding the provision of disincentives, to enforce a maximum grant requirement related to the minimum wage rate. It is clear that maximum grant regulations do provide an incentive to employment not present in states not imposing maximums by allowing recipients to retain earnings in excess of the grant, and that the effect of such regulations is to decrease tenure on the welfare rolls. See Schorr, *Explorations in Social Policy* (1968) at

29, comparing the experience in maximum-grant and non-maximum grant states, and Carter, *The Employment Potential of AFDC Mothers, supra* which suggests that experience under maximum grant regulations provided part of the inspiration for the 1967 work incentive amendments to the Social Security Act. Burns, *Social Security and Public Policy* (1956), makes clear that the "principle of less benefit" continues to supply a major influence over the setting of benefit levels in welfare programs. The Burns treatise points out that the ordinary incentives to employment are not fully operative with respect to certain groups "most vulnerable to the temptation to prefer benefit to work, namely, young workers who have not yet established regular work habits, married women, and casual or intermittent workers" (p. 62). It is further observed that "young workers who have not yet acquired regular work habits are a case in point. Studies of abuses of unemployment and disability insurance systems have revealed that women, especially married women, as a group often present this same general problem" (p. 57). Burns refers in this connection to a study by the newly-appointed Secretary of Labor George P. Shultz, "The Dynamics of A Labor Market" (1951), Chapter 6, which "found that most of the people drawing benefits and not looking for work were married women who wished to attend to family responsibilities". It is a major purpose of the 1967 amendments to the Social Security Act to induce precisely this group to seek employment. See also Hausman, *The 100% Welfare Tax Rate: Its Incidence and Effects* (1967); Durbin, *The Labor Market for Poor People in New York City* (1968). Thus during the much publicized discussion on the new administration's welfare proposals, Arthur Burns, then counselor to the President on domestic affairs and since nominated as Chairman of the Federal Reserve Board, stated:

"In some Southern States, the welfare payment is clearly insufficient to support a needy family.

On the other hand, there are other States in which the welfare payments going to a family are larger than what an unskilled man working at or close to the minimum wage can earn. This stimulates some people to leave work and join the welfare population. And many who continue working are unhappy and becoming bitter. They do not see why they should be taxed to support idlers.

* * * * * *

When you have a family where the father is working and the family income is less than that of another family which is living on welfare, we have a troublesome social problem. To handle it, *serious thought needs to be given, first, to setting a maximum on welfare payments so that welfare is not too attractive financially* and, second, to devising ways of supplementing the income of the honest and diligent working poor." (Emphasis added). U. S. News & World Report, "Interview with Arthur Burns," July 14, 1969 at 63, 64.

The application of a maximum grant regulation was rational to avoid disincentives to employment on the part of families with employable members (including women eligible for work incentive referral under the 1967 amendments) and was also rational in its application to families with unemployed or disabled members, for whom benefit levels under state workmen's compensation and unemployment compensation laws have traditionally been set at a fraction of earnings in order to avoid disincentives arising from imperfect administration of eligibility requirements. As already noted, the regulaton is rational in relation to the "absent parent" category, the other large category remaining in AFDC after recent expansions of OASDI assistance, and it is also the most rational way of allocating limited state funds so as to fully meet the needs of the largest possible number of families. The AFDC

program nationally has been criticized for encouraging desertion and for its "welfare tax" features discouraging employment by recipients; the State was entitled to consider that elimination of the maximum would exacerbate both these defects. The rationality of the regulation as a whole, and as to the overwhelming number of situations to which it was to be applied, is apparent, and the legislative authorities "(were) not bound to resort to a discrimination * * * which * * * would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion, logically pressed, would save the nominal power while preventing its effective exercise." *Purity Extract Co. v. Lynch,* 226 U.S. 192. It is to be noted that even many of the most ardent proponents of expanded social welfare benefits frequently state that the complete displacement of the indirect incentives provided by economic want will necessarily give rise to demands for more direct methods of social control in the form of detailed regulation of the conduct of beneficiaries or government conscription and compulsion of labor. Thus the noted British Historian, Edward Hallett Carr has written in Carr, "From Economic Whip to Welfare State," *The New Society* (1951), pp. 59-60;

> "The attitude of the new society to work is perhaps the most crucial issue which it has yet to face, since the fate of every society depends in the long run on the productivity of its workers. Whatever may be true of the political rights of man, the economic rights of man are meaningless and valueless without the acceptance of correlative economic obligations. A society which undertakes to ensure freedom from want to its members must be able to count on keeping up a level of organized production sufficient to meet their basic needs. Yet on no issue is the transition from the conceptions of the old society to those of the new marked by more hopeless confusion. The *laissez-faire* view of wages as the price of labour has long been

> tempered by the principle of a minimum wage adjusted to need, by family allowances and by social insurance; differences of remuneration originally designed to provide an incentive for the most intelligent and most industrious have been increasingly ironed out by the incidence of a highly progressive income tax; and the whole structure has now been overlaid by the structure of the welfare state in flat contradiction with the original design of the edifice. And this fog of confusion about positive incentives is made thicker by almost total reluctance to face the necessity of some form of sanction for a direction of labour to take the place of the discarded — rightly and necessarily discarded — economic whip . . ."

Compare the Swedish sociologist Alva Myrdal's remarks relating to the possible result of increased family allowances,

> "Looking at the problem not only from the social but also from the individual angle, it is immediately evident that cash subsidies would become merged in the average family budget without special regard for children. Increasing that budget by adding cash amounts to it monthly will only enlarge the funds available by a certain percentage, probably to be so distributed as to constitute small additions to the various budget items. The money may be added to the rent but perhaps only in order to get a larger living room. It may buy somewhat better food, but all will eat it. It may even go toward the mother's hat or the father's liquor account. Part of it will be used for more movies and magazines. To keep it apart for the children and to reserve it for the intended consumption improvement would be simply unmanageable except through obnoxious police control."[9] Myrdal, *Nation and Family* (1945), 142.

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[9] The tendency toward such "police controls" in the face of rising welfare costs is illustrated by the successive impairments of the "cash benefit" principle represented by the "protective payment" provisions of the 1962 and 1967 Social Security Amendments (P.L. 87-543, §108 (a); P.L. 90-248, §207 (42 U.S.C.A. §604 (b)).

Maryland was entitled to act on the belief, in designing its welfare program, that some measure of *laissez faire*, with all its cruelties and anomalies, was preferable to the political and economic problems and curtailments of freedom which might follow in the train of the government direction of labor possible if the principle of less benefit was totally dispensed with in the design of welfare programs. The state was entitled to believe that the use of administrative means to encourage employment was a greater evil than the limitations imposed by the maximum grant regulation, that such means would be less effective, see Carter, *supra*, at 8-9; Schorr, *supra*, at 29, and that there was no less restrictive alternative to that regulation. Compare Comment, *Compulsory Work for Welfare Recipients under the Social Security Amendments of 1967*, 4 Colum., J. L. & Soc. Prob. 197 (1968), criticizing the administrative methods of control provided by the 1967 Social Security amendments as a form of involuntary servitude. Moreover, the regulation is independently sustainable on at least three other grounds:

(1) As a means of maintaining an equity between welfare and wage earning families[10] necessary to insure public support for welfare programs. As recognized by Steiner, even

> "Retention of earned income as an incentive represents more of a political problem than its proponents acknowledge. Even in the insurance side of social security, where the claimant is encouraged to believe that he has a vested right to benefits related to contributions, a charge against benefits is made after a stipulated amount of earned income is reached. Only after age 72 may social security recipients have un-

[10] Maryland, like the federal government and unlike some states, such as New York, has no state general assistance program of wage supplements. The federal administration has recently proposed such a program. See note 7 *supra*.

> limited earnings without loss of benefits. As long as some social insurance benefits are forfeited by earned income, it is fanciful to suppose that politicians will allow public assistance benefits to go on without regard to income. The current exception of a significant amount of earned income in the case of the blind program is traceable to the overt, extreme, physical *quid pro quo* for relief that blindness offers. The recent, small, breakthrough in OAA is a rough measure of how the physical sacrifice of old age is ranked in this market. Once again, if ADC were a program serving widowed mothers, it would probably be easy enough to enact an earned income exemption for them. It is not so easy where illegitimacy and family conflict together represent the cause of so high a percentage of the cases because it would require the politician to tell his constituents that he is supporting a public policy which seems to equate promiscuity and lack of family responsibility with old age and blindness as reasonable grounds for assistance beyond the bare subsistence level. The compromise arrangement of the Economic Opportunity Act will probably affect job corps enrollees rather than ADC mothers; in any event, it is not an exemption of earnings, but, as the statute says, 'of payments' made by government. If Ford Foundation money can show that the incentive value of an earned income exemption can make a serious dent in the number of ADC cases, such a public policy may become palatable as an investment. In the meanwhile, it is only foundation policy, and foundation policy demands no behavioral sacrifices from its grantees; public policy does."

Steiner, *Social Insecurity: The Politics of Welfare* (1966), 131. Likewise Moynihan, in discussing the Advisory Council on Public Welfare's proposed "Nationwide Comprehensive Program of Public Assistance upon a Single Criterion; Need" and the proposal of legal scholars and social scientists that welfare be established as a *right*, pointed out that;

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"Again it may be noted that these are proposals that in the instance will tend to increase the number of persons on welfare. It should also be noted that they may also serve to lower the public's acceptance of the program. Social work professionals and bureaucrats assuredly have their limitations, but it is as near to certain as social science can be that they are considerably more permissive, broad-minded, and tolerant than the public at large. The strategy of politicizing the welfare issue is risky, indeed. It could easily serve to divide rather than unify American society, and would do so along just those lines of race and ethnicity that it has been the genius of politics in New York to keep blurred. * * *" Moynihan, *The Crises in Welfare*, 10 *The Public Interest*, 1, 22 (1968).

The maximum grant regulation, as an effort to maintain confidence in the reasonableness of welfare programs on the part of groups not presently benefiting from them is a product of normal processes of political compromise, as distinct from an all-or-nothing approach to public problems — a divisive approach scarcely constitutionally compelled. The Appellees here seek judicially decreed greater equity among welfare recipients at the cost of greater inequity between them and wage-earning families. These relative values are now the subject of more appropriate legislative appraisal in the federal Congress.

(2) As a reasonable limitation on the extent to which the state will provide subsidies for child support to welfare recipients which it does not provide to the public generally.[11] While the allowance per additional child provided by the welfare program is limited, the limited applicability to welfare recipients of the ordinary economic

[11] While invasions of privacy or the use of criminal or other drastic sanctions to discourage family growth undoubtedly runs afoul of constitutional safeguards, it is a far cry from this to say that the state may not withhold child subsidies from welfare recipients which are not made available to the public generally.

disincentives to childbearing has been noted by commentators such as Moynihan:

> ". . . while . . . spokesmen are increasingly protesting the oppressive features of the welfare system, and liberal scholars are actively developing the concept of the constitutional rights of welfare recipients with respect to such matters as man-in-the-house searches, it is nonetheless the fact that the poor of the United States today enjoy a quite unprecedented de facto freedom to abandon their children in the certain knowledge that society will care for them, and, what is more, in a state such as New York, to care for them by quite decent standards. Through most of history, a man who deserted his children pretty much ensured that they would starve, or near to it, if he was not brought back and that he would be horsewhipped if he were. Much attention is paid the fact that the number of able-bodied men receiving benefits under the AFDC program is so small. In February 1966 Robert H. Mugge, of the Bureau of Family Services of HEW, reported that of 1,081,000 AFDC parents, there were but 56,000 "unemployed but employable fathers". But in addition to 110,000 incapacitated fathers, there were some 900,000 mothers, of whom far the greatest number had been divorced or deserted by their presumably able-bodied husbands. A working class or middle class American who chooses to leave his family is normally required first to go through elaborate legal proceedings and thereafter to devote much of his income to supporting them. Normally speaking, society gives him nothing. The fathers of AFDC families, however, simply disappear. Only a person invincibly prejudiced on behalf of the poor will deny that there are attractions in such freedom of movement." Moynihan, *supra* at 10-11.

Similar concerns are reflected in the "family planning" provisions of the 1967 amendments, 42 U.S.C.A. §602 (a) (15). These concerns are not peculiarly related to contemporary American conditions. Cf. The Report of the

British Royal Commission on Population, Cmd. 7695 Art. 452 (1949) and compare the viewpoint of Simons, *Economic Policy for a Free Society* (1948) at 28-29:

> "A society based on free responsible individuals or families must involve extensive rights of property. The economic responsibilities of families are an essential part of their freedom and, like the inseparable moral responsibilities, are necessary to moral development. Family property in the occidental sense of the primary family, moreover, is largely the basis of preventive checks on population and of the effort to increase personal capacity from generation to generation, that is, to raise a few children hopefully and well or to sacrifice numbers to quality in family reproduction."

(3) As a less socially damaging means than across-the-board cuts of carrying out necessary economies. See Abbott, *From Relief to Social Security*, 286 (1941), where it is observed that as a matter of social work practice, "when limited funds are available, it is much better to give adequate relief to a small number of families and appeal to the leigslature or county board for funds to care for (others) . . . it is, at any rate, a mistake to reduce the whole program to the general level of poor relief."

## CONCLUSION

Reduced to its essentials, this case involves the constitutionality of a state regulation founded on the principle of "less benefit", a basic tenet of economic *laissez faire*, chosen as an alternative to more generous policies of assistance which would be accompanied by greater and perhaps less effective direct social controls. The case puts to the test as clearly as any case could the continuing vitality of the principles of Justice Holmes' dissenting opinion in *Lochner v. New York*, 198 U.S. 45, 75 (1905):

> ". . . (A) Constitution is not intended to embody a particular economic theory, whether of paternalism

> and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views . . . the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us."[12]

The drastic constitutional decision of the lower court, reached in disregard of principles of equitable abstention and in disregard of the principles which have governed federal judicial review of state economic legislation for the last thirty years should be reversed. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Snell v. Wyman*, 89 S. Ct. 553 (1969); *McInnis v. Ogilvie*, 89 S. Ct. 1197 (1969).

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[12] Compare *Schneider v. Smith*, 390 U.S. 17, 25: "The purpose of the Constitution and Bill of Rights, unlike more recent models promoting a welfare state, was to take government off the backs of people."

## PROOF OF SERVICE

I, Robert F. Sweeney, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 31st day of October, 1969, I served a copy of the foregoing Brief For The Appellant on the Appellees herein, by hand delivery, to Joseph A. Matera, Esquire, 341 N. Calvert Street, Baltimore, Maryland 21202.

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